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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES CLERK

OCTOBER, 1997 TERM

LPI DOWNTOWN INVESTORS 1, a California limited partnership, MICHAEL H. LAPIDUS,

Petitioners

v.

JAMES K. HAHN, individually and as City Attorney for the City of Los Angeles; RICHARD M BOBB, individually and as Deputy City Attorney for the City of Los Angeles; HOWARD D. STERN, individually and as Electrical Inspector for the City of Los Angeles; DAVID FONSECA, individually and as Building Inspector for the City of Los Angeles; ROLAND WIJANGCO, individually and as Building Inspector for the City of Los Angeles; HERBERT H. ZIMMERMAN, individually and as Plumbing Inspector for the City of Los Angeles; CARL J. MANZEL, individually and as Electrical Inspector for the City of Los Angeles; STAN UYEHARA, individually and as Health Inspector for the County of Los Angeles; KENNETH L. MARKS, individually and as Health Inspector for the County of Los Angeles; CITY OF LOS ANGELES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Administrative Search: To what extent can employees of municipal building and health agencies make non-emergency inspections of an apartment building without a warrant and without permission from the owner, where the owner and not the tenants will be the target of any resulting enforcement?

The following questions all involve searches of an apartment building which is always locked to outsiders (i.e., persons who are neither tenants nor their invited guests), conducted by inspectors authorized neither by warrant nor owners' permission to enter or inspect the building or any portion thereof.

a. Can the inspectors, enter such a building by slipping through the locked door when it is momentarily opened by an unidentified person exiting from the building?

b. After gaining entry in such fashion, can the inspectors lawfully conduct "survey inspections" to find code violations?

c. Can the inspectors inspect the common interior hallways of the building, which are locked to outsiders?

d. Can the inspectors, once in the common central hallways, knock on the doors of individual apartment units which face the hallways, and request entry to inspect the individual units?

e. Can the inspectors inspect vacant apartment units, which although generally kept locked may be temporarily unlocked to permit workmen to conduct repairs?

f. Can the inspectors enter a

private basement area which is generally kept locked and to which tenants have no right of entry at all?

g. Is an apartment building considered a "business" in the sense of Marshall v. Barlow's, 436 U.S. 307 (1978) such that limitations on searches of non-public areas apply?

2. Equal Protection: Where a group of administrative agencies, working informally as a "task force", nominally enforcing housing laws against what they consider to be "slum" landlords, applies both substantive and procedural standards far more stringent than any of the agencies normally applies individually, and the stringent standards include denial of procedural due process concerning meaningful notice to a landlord and the effective right to appeal building repair orders:

a. Can such task force select owners to be submitted to their more stringent regime without notice or opportunity for a hearing on the issue of whether or not the landlord's property is indeed a "slum"?

b. Can the task force properly deprive the affected owners of meaningful procedural due process with respect to repair orders, especially where such due process is available to owners with similar properties but not subject to task force enforcement?

c. Does the "malignant animosity" theory for an equal protection claim, expressed, for example, in Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995), apply in the context of an administrative agency with a virtually unfettered choice of standards, where the supervising member of the agency had, at a previous hearing, made unrestrained negative

remarks concerning the proposed target of the agency action, and such remarks were personal in nature and totally unrelated to the subject matter of the hearing?

3. Adjudication: Is placement of a building in the more stringent enforcement regime an "adjudication" so as to require the decision makers be in compliance with ordinary standards of administrative adjudication. If placement in the task force regime is an "adjudication",

a. Can the adjudicators hold meetings in secret, such that:

(i) an affected landlord cannot know that his property is the subject of a meeting concerning possible placement in the task force regime until after a determination has been made by the task force to include the property;

(ii) owners have no meaningful right to challenge such adjudications, except possibly by expensive court action;

(iii) no member of the adjudicatory panel can be effectively challenged for bias prior to or at the time of the adjudication.

b. Is the following sufficient evidence of adjudicatory bias to preclude an order granting summary judgment in favor of respondents on the issue of bias?

(i). The de facto supervising member of the administrative panel had, prior to the adjudication, in a related case, referred to the primary petitioner herein as a "sleaze and a devil".

(ii). The de facto supervisor of the administrative panel admitted that a prior decision by the task force concerning such primary petitioner involved a "political decision" to take enforcement steps against the primary petitioner.

(iii).While there normally is some internal procedure within relevant agencies for referring a property or owner into the task force enforcement regime, no such procedure was followed here. In fact, none of the respondents, who were the only parties who would know, were able to explain how petitioners' property was even considered to be subjected to the task force regime.

4. Procedural Due Process: Can the task force record a substandard notice in public records of the County Recorder stating that the property is substandard, without notice or an opportunity for a hearing, where the recording of such notice has specific and immediate economic effect on the owner?

5. Procedural Due Process: Can vacant units be temporarily declared unrentable by inspectors, under threat of criminal prosecution of the building owner, without notice and opportunity for a hearing?

6. Law of the Case: Does a subsequent criminal prosecution for housing code violations retroactively validate a prior, related civil procedural due process violation which does not directly involve facts essential to the prosecution?

7. First Amendment: Where petitioners submitted evidence that they exercised their First Amendment right of access to the Courts in a prior controversy with a City housing agency, and further evidence that such exercise of that

right angered the de facto head of the agency, was such evidence sufficient to shift the burden to Respondents to prove that their actions were not retaliatory, and thus were not First Amendment violations.

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List of Parties and of Corporate Affiliates of Petitioner

A list of parties is in the caption of the case. The petitioner is not a corporation, so no list of affiliates is required.

Citations of Opinions and Orders Entered in the Case

None.

Basis for this Court's Jurisdiction

(i) The order of which review is herein sought was filed in the United States Court of Appeals for the Ninth Circuit on February 13, 1998.

(ii) An order denying a rehearing petition on the order sought to be reviewed was filed in the United States Court of Appeals for the Ninth Circuit on April 3, 1998.

(iii) Not applicable.

(iv) The decision at issue is reviewable by this Court under 28 USC 1254(1).

(v) Does not appear to apply.

Constitutional Provisions, Statutes and Court Rules Involved in the Case
United States Constitutional Provisions

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes of the United States

28 USC 1983

Every person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

1. Procedural History:

The action was filed in United States District Court for the Central District of California in 1993. Defendants' (hereinafter, "Respondent"s') motion for dismissal under FRCP 12(b)(6) was granted. Plaintiffs' (hereinafter, "Petitioner"s') appealed to the United States Court of Appeals for the Ninth Circuit ("9th Circuit"). The 9th Circuit affirmed in part and reversed in part. Petitioners amended their complaint, seeking damages for claimed constitutional rights violations during civil enforcement of various inspection and repair orders, and both sides moved for summary judgment. Summary judgment was granted in favor of Respondents, by order filed November 1, 1996.

The order dismissing the action on summary judgment was timely appealed to the 9th Circuit.

The 9th Circuit affirmed by unpublished Memorandum Opinion (the 9th Circuit Opinion) filed February 13, 1998. Petitioners filed a timely motion for rehearing which was summarily denied by order filed April 3, 1998.

2. Statement of Facts:

Petitioners' older inner city apartment building in Los Angeles was extensively inspected by City inspectors in 1990. At that time, after completion of required repairs and upgrades, it received an official notice of compliance in early 1991.

Later in 1991, Petitioner Lapidus became embroiled in litigation with the Los Angeles City Attorney's office concerning inspections conducted at a different property by an informal "task force" ("HTF") assembled and controlled by the City Attorney's office. That 1991 dispute was covered by the news media, and to an extent, reflected negatively on HTF.

In the 1991 litigation Respondent Deputy City Attorney Richard Bobb ("Bobb") testified under oath that a "political decision" had been made to pursue certain enforcement measures against Petitioner Lapidus. Bobb has since stated he regretted his testimony and characterized it as one of the most stupid things he has ever said. From that point on, Bobb appeared determined to drive Lapidus out of the rental property business.

In 1992, the HTF gained entry without a warrant or permission from the owner or manager, or any authorized person, to Petitioners' property at issue in this case (the "Property"), by passing through the locked front security door.

Even though the Property had recently received an official notice of compliance, it was promptly labeled "substandard" after the HTF inspection, in a publicly recorded notice by the HTF, without any meaningful opportunity afforded petitioners to administratively challenge that determination.

Petitioners spent tens of thousands of dollars trying to satisfy the 1992 HTF repair and upgrade orders, which applied far more stringent standards than "normal" non-HTF inspections. Petitioners ultimately lost their building in foreclosure as a result of the costly and unnecessary, but unchallengeable HTF orders.

Although the HTF orders were civil at the outset, Petitioners subsequently were prosecuted for conditions claimed by HTF inspectors to exist at the times of later 1992 inspections.

Reasons Relied on for Allowance of the Writ

This petition meets criteria for Certiorari under Supreme Court Rules 10(a) and 10(c).

1. Fourth Amendment Claims:

In Wilson v. Health & Hospital Corporation of Marion County, 620 F.2d 1201 (7th Cir. 1980), the Seventh Circuit made clear that an unwarranted inspection of an apartment building, guided by an individual who was presumably an occupant of the property, violated the Fourth Amendment, since, even when the property was unsecured, the inspector lacked authority to be on the property at all without a warrant or consent of the owner.

The decision of the 9th Circuit in Petitioner's case was directly contrary to the

7th Circuit's opinion in Wilson; in the matter now before this Court, the 9th Circuit, in apparently basing its decision on the inapposite opinion in United States v. Santana, 427 U.S. 38,42 (1976), analogized the unwarranted and unauthorized entry of inspectors into Petitioner's locked building to make an administrative inspection for possible housing code violations, to the entry of policemen into a single family residence in hot pursuit of a drug suspect whom they had probable cause to believe was carrying contraband.

In addition to tension with Wilson v. Health & Hospital, the 9th Circuit's opinion in the matter before this Court also appears to conflict with several decisions of this Court. This petition, in effect, asks the Court to resolve the division among circuits that have considered the question of the extent, if any, to which housing inspectors, without owner's authorization or a warrant, can enter such a locked property, both as to common areas, and areas to which even tenants are not admitted.

Camara v. Municipal Court, 387 U.S. 523 (1967), and interpretive comments in Donovan v. Lone Steer, 464 U.S. 408 (1984), provide that search of an apartment building requires a warrant or the landlord's consent. Neither was present here.

An apartment building is a commercial enterprise from the owner's perspective. Marshall v. Barlow's, 436 U.S. 307,311 (1978), makes clear that employees, analogous to Petitioners' apartment tenants, in the sense they are not owners, but entitled to be on the business premises, lack standing to admit health and safety inspectors to non-public areas.

While courts may permit some relaxation of Fourth Amendment protections in exigent circumstances concerning drugs or violent crimes, nonconsensual warrantless searches are invalidated almost without exception if a search is administrative and involves acts not malum in se, but only malum prohibitum. Cf. concurring op. of Justice Jackson in McDonald v. U.S., 335 U.S. 451, 458-59 (1948).

The warrant requirement may be eliminated in administrative searches of premises used in a closely regulated business or industry. Donovan v. Dewey, 452 U.S. 594 (1981)(mines); United States v. Biswell, 406 U.S. 311 (1972) (firearms); Colonade Catering v. United States, 397 U.S. 72 (1970) (alcohol). However, apartment buildings are not within such exception.

Camara is very clear that "It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." Camara at 533.

The 9th Circuit Opinion adverse to Petitioners relied on inapposite cases including United States v. Nohara, 3 F.3d 1239 (9th Cir. 1993) and United States v. Eisler, 567 F.2d 814 8th Cir. 1977) which concerned Fourth Amendment rights of tenants in drug investigations, rather than administrative searches covered by Camara.

Donovan v. Lone Steer, 464 U.S. 408 (1984), in referring to Marshall v. Barlow's, supra, Camara v. Municipal Court, supra, and See v. City of Seattle, 387 U.S. 541 (1967), stated: "In each case, this Court held that an administrative warrant was required before such a search could be conducted without the consent of the owner of the premises." Donovan at

414. This Court presumably knew the distinction between an owner and tenant or third party when it made the reference to an owner.

Petitioners' evidence, consisting of declarations submitted in connection with the summary judgment motion at issue here was clear that neither the owner's consent nor the consent of the resident manager had been obtained by HTF inspectors to enter any portion of the Property.

a. Improper Search Of The Basement:

At the summary judgment hearing, the District Court indicated that the HTF inspectors were possibly claiming that they didn't inspect the basement. However, inspectors Marks and Uyehara admitted in Amended Declarations In Support of their motions for summary judgment that they took photographs in the basement.

In addition, other Respondent inspectors admitted having inspected the basement. For example, Respondent Stern testified in his lodged deposition that he "went into the basement, but didn't recall how". Several Respondent inspectors said that if doors were not locked, they entered through unlocked doors as part of their inspection. However, the mere fact that a door is unlocked does not make entry legal. See Horack v. Superior Court, 3 Cal.3d 720 (1970). One inspector testified in his deposition that an unidentified woman, who he presumed was the manager, unlocked doors for which she had the keys. That inspector, Respondent Zimmerman, admitted in his deposition, however, that the woman spoke Spanish and that he did not understand the Spanish language. Furthermore, the manager and his spouse both denied, in declarations filed in the District Court, that they had permitted access to the building to any inspector.

Respondents Marks and Uyehara contended, in support of their summary judgment motions, that if there was no expectation of privacy in the basement, no consent was necessary to enter. Those Respondents did not rebut evidence submitted by Petitioners that the basement was a private area reserved for the landlord.

Counsel for Marks and Uyehara even conceded at the summary judgment hearing that the facts surrounding the basement might become a factual issue, "what it was used for, whether the inspectors had a way of knowing that it was . . an exclusive area for the landlord".

b. Improper Search of Vacant Apartment Units

With respect to vacant units, Petitioners requested that the District Court take judicial notice of portions of transcripts from the housing code prosecution involving the Property, where at least one Respondent HTF inspector, Marks, testified that he had "observed" one vacant unit. While the District Court construed this to mean that the inspector saw a vacant unit but did not enter, Petitioners contended that "observed" meant that the inspector entered and inspected the vacant unit. The District Court agreed that the statement was ambiguous.

The HTF Health Department order required that "vacant units be brought up to code," and mentioned the need to remove trash or accumulated debris from vacant units. This implied that HTF entry was made into vacant units; otherwise, the HTF irrationally would have been issuing blind orders to comply. Coupled with the ambiguous reference by HTF inspector Marks in prior sworn testimony about "observing" a vacant unit, it was a disputed material fact whether HTF members had entered

vacant units while inspecting the Property.

c. Improper Search Of Common Hallway. Respondents had admitted slipping into the hallway, through the locked door of the building, as unidentified parties exited. After entering in such manner, the HTF members then inspected common hallway areas, none of which were visible from the street. Such behavior appears to be (i) in violation of the precepts of Camara, as interpreted by Donovan. and (ii) in violation of the purpose of the inspection warrant procedure.

While police (or inspectors) can, in appropriate circumstances "stand in the shoes of third parties," here they could not do so without the consent or such third parties. Cf., e.g., United States v. Wilson, 472 F.2d 901, 902 (9th Cir. 1972) (landlord found unit open and vacated, containing apparently abandoned contraband, and telephoned police; police entry and seizure was based upon landlord's request).

The 9th Circuit, supporting its contention that "slipping into a common area" of a locked apartment building is acceptable within the standards raised by the Fourth Amendment, cited United States v. Eisler, where drug enforcement officers did so in an effort to conduct surveillance of drug transactions. But the issues raised in Donovan and Camara are not present in Eisler, which appears to be governed by other law. Particularly, the landlord in Eisler was not the person with standing to oppose the entry; thus Donovan and Camara were not applicable to Eisler. But Donovan and Camara are particularly applicable to owners' rights concerning building inspections, the primary issue in this Petition.

As noted, the 9th Circuit cryptically indicated that the distinction between the owner's standing and a tenant's standing was not raised in United States v. Santana, 427 U.S. 38, 42 (1976). It is difficult to see how a case involving pursuit of a drug suspect into her home, after she was initially visible from the street by officers already possessing probable cause to make an arrest, is relevant to deny property owners standing to oppose unwarranted building inspections.

Furthermore, even if there is some remotely attenuated connection between Santana and the matter under review, it appears more logical to apply the Supreme Court decisions which are on point, than to reach so far afield in an effort to support what appears, respectfully, to be a flawed analysis.

By failing to address Petitioners' Fourth Amendment claims concerning the warrantless, nonconsensual searches by HTF of the private basement and vacant units, the 9th Circuit implicitly condoned the illegal searches.

Pretextual claims of reasonable belief of authorization to search should not be upheld by a court. Stoner v California, 376 U.S. 483, 388 (1964). Slipping through a security door which a tenant or guest necessarily opens to exit the building cannot be construed as entry with consent. Searches of occupied tenant units in the Property without landlord consent were also upheld by the 9th Circuit without evidence of informed consent by any lawful occupant.

2. Procedural Due Process Claims:

a. Ex Parte Recording Of Public Substandard Notice:

Respondents violated Petitioners' due

process rights by causing a substandard notice to be recorded ex parte in public records against Petitioners' Property. Some of the Respondents admitted such notice could negatively impact the sale or refinancing of the Property. Recording of the substandard notice also gave building tenants the right to stop paying rent, because in California, a substandard notice can be used as an affirmative defense against an unlawful detainer action.

Connecticut v. Doehr, 111 S. Ct. 2105 (1991) holds that even temporary or partial impairments to property rights that attachments, liens and similar encumbrances entail are sufficient to merit due process protection. In Doehr, the ex parte attachment invalidated by the Supreme Court had been approved by a judge. Recording of the substandard notice in Petitioners' case, having similar adverse impact on property rights as the attachment in Doehr but completed with no court scrutiny, violated due process.

b. Biased Adjudication Of Substandard Status:

Petitioners also claimed that the secret decision of the HTF determining Petitioners' Property to be "substandard" and placing the Property into the special regime where landlords lose many civil procedural and substantive rights, was an adjudication of status which required a neutral adjudicator.

The District Court agreed that HTF treatment was disparate from non-HTF treatment, also noting that it was harsh and not aimed at working with the landlord.

The determination that the Property was substandard, as reflected in the recorded

notice, eliminated entitlements of Petitioners vested under City Law. This is because provisions of the Los Angeles City Municipal Code gave owners of existing apartment buildings, including Petitioners, vested rights not to conform to many building regulations adopted after the construction of their buildings provided the buildings did not become substandard. Petitioners thus had an obvious interest in being allowed to contest a determination that the Property had become substandard. The loss of rights and entitlements resulting from the determination of substandard status highlights that the decision to place petitioners' property in the HTF regime was an adjudication under clearly established, long existing court precedents. Cf. Hannah v. Larche, 363 U.S. 420,442 (1960). Also, see Rochester Telephone Corp. v. United States, 307 U.S. 125,143-4 (1939).

HTF inspectors and prosecutors from the City Attorney's Office are enforcement officers, not neutral adjudicators. Where an initial determination is made by a party acting in an enforcement capacity, due process generally requires a neutral adjudicator to conduct a de novo review of all factual and legal issues. Concrete Pipe and Products of Calif. v. Construction Laborers' Pension Trust for Southern California, 113 S. Ct. 2264 (1993).

Money spent by Petitioners in trying to comply with HTF orders was irretrievable even if Petitioners were never subject to later prosecution. A simple, impartial de novo determination if Petitioners' Property really warranted HTF treatment or was swept along on a tide of bias would have enabled Petitioners to avoid incurring tens of thousands of dollars of unnecessary repairs which led to foreclosure of

the Property.

As the District Court noted, in the instant case Respondent Bobb wore two hats. He was a criminal prosecutor, but he also was head of the HTF. This meant that Bobb was in a position to control the pre-prosecution civil enforcement phase when HTF activities concerning the Property were administrative in nature.

Bobb had testified under oath in prior litigation that a "political decision" had been made by the City Attorney's Office to charge Lapidus in a different case, a statement Bobb characterized as his most stupid comment and which he regretted making. Petitioners submitted a declaration of an attorney involved in that prior litigation that Bobb subsequently referred to Lapidus as a "sleaze" and a "devil."

The adjudication at issue here, placing Petitioners' Property into the HTF, was further tainted by the fact that HTF was controlled by Bobb who was virulently biased against Petitioner Lapidus. The Court of Appeals Opinion failed to apply Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) (which held due process is violated by the presence of one biased member of a small adjudicative panel.)

3. Law Of The Case Issues:

Citing United States v. Flores-Payon, 942 F.2d 556,558 (9th Cir. 1991), the 9th Circuit Opinion barred any procedural due process claim as waived because supposedly not presented to the District Court in Petitioners' First Amended Complaint.

Claims in the First Amended Complaint ("FAC") included Tortious Interference with Constitutional Rights (Second Cause Of Action),

which is a general claim for any constitutional violations which fall within the purview of 42 USC 1983, and a general claim for violation of civil rights (Fifth Cause Of Action). Procedural due process violations fell within the ambit of this pleading.

It was clear from the FAC that Petitioners had claims stemming from recording of the substandard notice, and additional claims relative to Bobb's bias and control of the HTF decision making process. Petitioners also claimed they were inhibited by language in HTF orders from renting vacant units without any pre- or post-deprivation hearing, a due process violation.

The substance of the adjudication issue concerning Bobb's bias and involvement in the decision placing Petitioner's Property into the HTF was also argued at the summary judgment hearing. Petitioners also note that Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) (which held due process is violated by the presence of one biased member of a small adjudicative panel), was decided after the first appeal in this case.

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160, 1163 (1993) held that application of a "heightened pleading standard" in a 1983 action against a municipality was inconsistent with the liberal system of "notice pleading." Also, a challenge to the specificity of complaint is properly raised only in a motion to dismiss. Palmer v. Sanderson, 9 F.3d 1433 at fn 1 (9th Cir. 1993).

The 9th Circuit Opinion gave an unduly restrictive interpretation of Flores-Payon, which merely declined to consider a claim only

when the appellant therein "failed to raise the issue at the district court." As indicated in footnote 1 to the Flores-Payon opinion, quoting United States v. Jefferies, 908 F.2d 1250 (11th Cir. 1990), the purpose of the appellate court in not considering arguments raised for the first time on appeal is to give the District Court the opportunity to correct its errors.

In the instant case, Petitioners' procedural due process claims were raised in District Court. The issue of Bobb's bias and role in the classification of the Property as substandard was argued in the trial court early in the case. Another procedural due process claim, arising from the recording of the substandard notice, also was raised extensively in the District Court in various memoranda of points and authorities filed by petitioners in connection with the summary judgment hearing.

Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal. Jeffries v. Wood, 114 F.3d 1484 (9th Cir. en banc 1997).

Although the 9th Circuit, in a prior appeal, did affirm dismissal of a procedural due process claim in Petitioners' original complaint, it did so only with respect to a narrow issue whether Petitioners could be criminally prosecuted without being given an opportunity to first repair alleged code deficiencies.

The prior appellate opinion did not deal with pre-prosecution period civil due process issues such as the recording of a substandard notice or the biased adjudication when the Property was accepted into the HTF program for

initial civil enforcement.

Since the holding in the prior appeal didn't cover procedural due process with respect to such other matters, such matters were properly the subject of an amended complaint. Sierra Club v. Penfold, 857 F.2d 1307,1312 (9th Cir. 1988).

Once a case is remanded, the District Court is free to rule, not only on the issue directed in the remand, but on other issues as well, so long as the mandate does not direct to the contrary. Nguyen v. United States, 792 F.2d 1500, 1502 (9th Cir. 1986).

4. Equal Protection Claims:

The 9th Circuit Opinion indicated that there was no factual basis presented to make the "malignant animosity" theory of Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995) relevant to the instant case.

Malignant animosity, or at least the disputed factual issue concerning its presence, was established by evidence that Bobb, in comments to a third party, referred to Petitioner Lapidus as a "sleaze" and a "devil." This vicious name calling was unrelated to the property management matters at issue in the case. It is assumed that the 9th Circuit agreed with the District Court's comment at the summary judgment hearing that Bobb did not think well of Petitioner Lapidus.

The only shortcoming stated in the 9th Circuit Opinion concerning this particular equal protection claim was the purported failure "to produce any evidence to show that similarly situated buildings were not inspected by the task force." 9th Circuit Opinion, pg. 3. The 9th

Circuit misunderstood this claim. The issue was whether Bobb's animosity caused the Property to be subjected to the HTF regime when it would not otherwise have been.

The second equal protection claim was that HTF activities were too attenuated to promotion of health and safety to allow over-enforcement of minor housing codes against Petitioners. Petitioners produced evidence that the HTF actually was a vehicle used to serve personal political ambitions of members of the City Attorney's Office, with codes also being over-enforced to retaliate against HTF opponents.

The 9th Circuit Opinion opined that the City had a legitimate interest in using a specialized task force to enforce housing codes against recalcitrant property owners, but was silent whether it would be legitimate to use such a task force against non-recalcitrant owners for political purposes as Petitioners contended occurred.

Even if a City properly joins or forms a special task force, Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir 1996) precludes - on Equal protection grounds - task force operations to over-enforce housing codes for reasons too attenuated to health and safety.

The 9th Circuit Opinion also concluded, without any stated reasons, that Petitioners' argument concerning the arbitrary, and irrational nature of HTF inspections was unpersuasive. However, some HTF orders were so vague, they instructed Petitioners to cure unspecified deficiencies in unspecified apartment units.

By ignoring the attenuated relationship of such HTF orders to health and safety, the Panel seemed to follow a dissent on equal protection, rather than a majority view, from Armendariz, but only an en banc panel may overturn existing Circuit precedent. Jeffries v. Wood, 114 F.3d 1484 (9th Cir. en banc 1997).

5. The First Amendment Claims:

The 9th Circuit Opinion indicated that Petitioners' First Amendment claim improperly named Respondents other than Bobb because the District Court's dismissal of the claim previously had been reversed only as to Bobb. The 9th Circuit Opinion also said no evidence was submitted that Bobb retaliated against Petitioners.

Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995), decided after the prior appeal in this case, suggested that members of an informal task force may be subject to joint and several liability for any constitutional violations. Where a task force structure is completely ambiguous, as is the case with the HTF, it is possible that individuals as well as entities might be found to be component "members" for joint and several liability purposes.

The District Court appeared to indicate all Respondents might be liable, or at least forced to trial, on Petitioners' retaliation claim: "If the disputed facts taken most favorably to the plaintiff would lead to a legitimate inference that that's what happened, everybody stays in; it's that simple."

A trier of fact could infer that Bobb controlled the HTF at the time the Property was "accepted" into the HTF; that Bobb had

substantial animosity towards Lapidus from events preceding the time when the Property was accepted into HTF; that Bobb wanted Lapidus out of the rental housing business; and the Property had been recently found in compliance yet mysteriously was suddenly suitable for harsh and disparate HTF treatment. Petitioners also submitted evidence that their treatment, even among HTF cases, was "unique", as testified to by Respondent Inspector Zimmerman in his deposition.

The 9th Circuit cited Steckl v. Motorola, Inc., 703 F.2d 392,393, (summary judgment cannot be avoided based on hopes of challenging credibility of an opposing witness through cross-examination).

In Steckl, the defendant had an actual non-discriminatory reason for its conduct denying the plaintiff a promotion. Here, in contrast, none of the Respondents had personal knowledge how the Property was referred to the HTF or could explain why steps which usually would have been taken before a referral to the HTF were bypassed. Those steps, which normally would have included at least one office conference with Petitioners before referral of their Property to HTF, strangely did not occur.

Petitioners also presented evidence, in the deposition testimony of a Health Department chief, that a referral to HTF would be unusual where the compliance period for a non-HTF Health Department order had not expired. Yet that further departure from ordinary procedure also occurred in this case. An HTF inspector made a survey inspection of the Property for acceptance into the HTF before the compliance period on the only non-HTF Health Department order against the Property had expired.

The controlling authority in this situation is Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Here Petitioners submitted evidence of (i) Bobb's desire to cause Lapidus to get out of the housing business after earlier litigation between Lapidus and HTF, and (ii) Bobb's animosity. For example, as soon as Petitioner Lapidus defeated a meritless probation charge in court, Bobb filed charges on this Property.

The burden should have shifted to the Respondents to establish this Property would have (not could have) been referred to the HTF even in the absence of the protected First Amendment conduct. Since none of the Respondents had knowledge why the Property was referred to the HTF, HTF could not have carried that burden.

CONCLUSION

With the case law actually favoring Petitioners, and with patently obvious disputed material factual issues, summary judgment should never have been entered against Petitioner or affirmed by the 9th Circuit.

Certiorari should be granted, to resolve the division among the circuits with respect to the search questions, and because of the failure of the 9th Circuit to follow applicable decisions of this Court. Certiorari is additionally requested on the basis that the (mis)conduct of the HTF is ongoing, and, based upon new Los Angeles City ordinances involving housing inspections, is likely to expand.

Respectfully submitted,
Michael H. Lapidus, Inc.
by Michael H. Lapidus
Michael H. Lapidus
Attorney for Petitioners

APPENDIX

APPENDIX A – JUDGMENT OF THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA FILED NOVEMBER 1, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LPI DOWNTOWN INVESTORS 1;
MICHAEL H. LAPIDUS,

CV 93-1144 JSL

Plaintiffs,

v.

JAMES K. HAHN, ET AL.,

Defendants.

The cross motions for summary judgment of plaintiff LPI Downtown Investors, 1 and Michael H. Lapidus, and of defendants James K. Hahn, et al. came for hearing regularly on October 21, 1996. Having examined plaintiffs' materials in exhaustive detail, the Court finds that they do not support the propositions for which they are offered, although they were no doubt offered and argued in good faith.

Plaintiffs have failed to create a genuine issue of material fact in support of their claims that defendants subjected plaintiffs to anything other than defendants' ordinary procedures. Two of these claims merit further discussion because they were the most difficult to understand. The difficulty arose in ascertaining the difference between what was described in good faith as the evidence and what the evidence actually turned out to be.

The first difficult claim is plaintiffs' claim that city defendants reinspected

plaintiffs' building knowing that plaintiffs had had less than thirty days notice. From this, plaintiffs argue that a jury could infer there was a bias in the inspection which resulted from the city defendants' retaliatory motive. Plaintiffs have failed to create a genuine issue of fact because their only evidence of the shortened notice is inadmissible hearsay. Even if this evidence were admissible, it actually supports defendants' position that they believed plaintiffs had received thirty days notice when defendants conducted the reinspection. Finally, plaintiffs have not shown that they are entitled to any notice at all prior to reinspection.

Plaintiffs' other claim presenting some difficulty is that they had a reasonable expectation of privacy in the building's basement which was violated when the defendants inspected it. Plaintiffs failed, however, to meet their burden to show that they had a reasonable expectation of privacy in the basement. The uncontroverted evidence shows that plaintiffs had no more that a limited expectation of privacy because other people had access to the basement. Moreover, plaintiffs have not put forth any evidence to rebut defendants' testimony with the consent of a person who had access and the apparent right to consent. Plaintiffs asserted that Mr. Lapidus had queried some of the people with access to the basement, who could have given consent, and they denied consenting. This assertion creates no genuine issue of fact both because it is inadmissible hearsay and because it does not establish that they was no one else who might have given the consent.

Not having sustained claims that they were treated outside defendants' ordinary procedures, plaintiffs challenge the procedures themselves on equal protection grounds. Plaintiffs' equal protection claim is that landlords subject to

the Housing Task Force are treated differently than other landlords. [1] Since plaintiffs failed to show landlords subject to the Housing Task Force are a protected class, or that a fundamental right is at issue, they must show that these landlords are treated with no rational relation to a legitimate government interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 412, 440, 105 S. Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985).

Plaintiffs do not dispute that health and safety, at which the Housing Task Force is aimed, are legitimate government interests. Instead, plaintiffs argue that the Housing Task Force methods have no rational relation to health and safety because their efforts are not directed primarily at cure but at criminal prosecution of landlords. So long as the manner of identifying landlords for the Housing Task Force is not otherwise unlawful, the Court finds nothing wrong with it being the Housing Task Force's primary purpose to prosecute the people referred to them. Prosecution of recalcitrant landlords furthers health and safety both by punishing those landlords and by deterring other landlords from violating the health and safety codes. In addition, by proceeding directly to prosecution and not to cure, the Housing Task Force may actually encourage cure by proceeding with the prosecution, and, if the defendant then

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1. Plaintiffs also make the equal protection claim that they were singled out as a "class of one" for abuse by the City Attorney's Office. Their claim reduces itself to the claim that once the City Attorney has prosecuted a landlord and said bad things about the landlord, he cannot prosecute the landlord again. The City Attorney can no more be held to such a ruling than could a state or federal prosecutor, or any other law enforcement body.

cures the problem, dropping the prosecution.

IT IS HEREBY ORDERED AND ADJUDGED that the motions for summary judgment of city and county defendants James K. Hahn, et al. be granted and that the motion for summary judgment of plaintiffs LPI Downtown Investors, 1 and Michael H. Lapidus be DENIED. The Court may amend or amplify this order with a more specific statement of the grounds for its decision.

IT IS SO ORDERED.

DATED: Nov 1, 1996 /s/ J. Spencer Letts
J. SPENCER LETTS, UNITED STATES DISTRICT JUDGE

APPENDIX B -- MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 13, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-55018
D.C. NO. CV-93-01144-JSL

LPI DOWNTOWN INVESTORS 1, a California limited partnership; MICHAEL H. LAPIDUS,

Plaintiffs-Appellants,

JAMES K. HAHN, individually and as City Attorney for the City of Los Angeles; RICHARD M. BOBB, individually and as Deputy City Attorney for the City of Los Angeles; HOWARD D. STERN, individually and as Electrical Inspector for the City of Los Angeles; DAVID FONSECA, individually and as Building Inspector for the City of Los Angeles; ROLAND WIJANGCO, individually and as Building Inspector for the City of Los Angeles; HERBERT H. ZIMMERMAN, individually and as Plumbing Inspector for the City of Los Angeles; CARL J. MANZEL, individually and as Electrical Inspector for the City of Los Angeles; STAN UYEHARA, individually and as Health Inspector for the County of Los Angeles; KENNETH L. MARKS, individually and as Health Inspector for the County of Los Angeles; CITY OF LOS ANGELES,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California J. Spencer Letts, District Judge, Presiding

Memorandum

Submitted February 5, 1998*
Pasadena, California

Before: WALLACE, TROTT, and HAWKINS,
Circuit Judges.

LPI Downtown Investors 1 (LPI) appeals from the district court's summary judgment on its due process, equal protection, Fourth Amendment, and First Amendment claims, stemming from the investigation by the City of Los Angeles's (City) Housing Task Force (task force) of LPI-owned property. The district court had jurisdiction under 28 U.S.C. Sec. 1331 and 42 U.S.C. Sec. 1983. We have jurisdiction over this timely filed appeal under 28 U.S.C. Sec. 1291 and we affirm.

In its amended complaint, LPI raises a substantive due process claim, alleging that the actions were arbitrary and oppressive and deprived it of its property. However, nowhere in is brief does LPI address substantive due process. Therefore, we deem this issue waived. See Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994).

LPI raises a procedural due process claim for the first time on appeal. Because this claim was not presented to the district court in the First Amended Complaint, it is waived as well. See United States v. Flores-Payor, 942 F. 2d 556, 558 (9th Cir. 1991). Moreover, our earlier memorandum disposition affirmed the

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

District court's dismissal of this claim. LPI Downtown Investors 1 v. Municipal Court, 51 F.3d 281, 1995 WL 146820, at *2 (9th Cir. 1995) (LPI Downtown). Under the law of the case, we will not revisit this issue. See Dean v. Trans World Airlines, 924 F.2d 805,810 (9th Cir. 1991) (Dean)

Next the district court properly entered summary judgment on LPI's equal protection claim. LPI argues that it should be allowed to proceed to trial under the "malignant animosity" theory espoused in Esmail v. Macrane, 53 F.3d 176,179 (7th Cir. 1995). We need not decide whether we should adopt this theory because there is no factual basis presented to make its application relevant.

In Esmail, the plaintiff was denied a liquor license ostensibly based on minor infractions while others were granted licenses despite more severe infractions. Id. at 178. Similarly, in Ciechon v. City of Chicago, 686 F.2d 511,522 (7th Cir. 1982), there was evidence that two paramedics were equally responsible for a patient; yet, the city investigated and fired one paramedic, and took no action against the other. LPI, on the other hand, has failed to produce any evidence that similarly situated buildings were not inspected by the task force.

Additionally, LPI unpersuasively argues that the task force inspections are arbitrary and irrational. The City has a legitimate interest in using a specialized task force to enforce housing regulations against recalcitrant property owners.

LPI's First Amendment claim is based on a theory of retaliation. Our previous memorandum disposition reversed the district court's on this claim only as to deputy city attorney Bobb. LPI Downtown, 1995 WL 146820, at *2. LPI's First Amended Complaint names all defendants in this claim, but under the law of the case this claim cannot be brought against any parties other than Bobb. See Dean, 924 F.2d at 810.

LPI must show that Bobb directed the task

force to investigate it in retaliation for seeking redress for grievances in court. See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310,1314 (9th Cir. 1989). However, LPI offered no evidence that Bobb was responsible for referring the property for investigation by the task force. While Bobb's denial of having done so would not be sufficient to sustain summary judgment in the face of conflicting evidence, LPI presented no contrary evidence. Therefore, we affirm the district court's summary judgment on the retaliation claim against Bobb. See Fed. R. Civ. P. 56(e); Steckl v. Motorola, Inc., 703 F.2d 392,393 (9th Cir. 1983)(holding that a plaintiff cannot avoid summary judgment on the hopes of challenging the credibility of opposing witnesses through cross-examination).

LPI's final claim is that the task force inspectors violated its Fourth Amendment privacy rights when they entered the apartment building without a warrant. Hahn asserts that LPI lacks standing to challenge this search. LPI, as the property owner, has sufficient standing to raise this claim. See Camara v. Municipal Court, 387 U.S. 523,534 (1967).

Whether LPI has a reasonable expectation of privacy inside the building, however, is an altogether different question. The common hallways are public places for Fourth Amendment purposes. United States v. Nohara, 3 F.3d 1239,1241 (9th Cir. 1993)(Nohara). LPI argues unpersuasively that Nohara focused on a tenant's, as opposed to a landlord's, expectation of privacy. United States v. Santana, 427 U.S. 38,42 (1976), made no such distinction, and neither will we. Nor can LPI effectively assert "an expectation of privacy that the [building] not be subject to unannounced, warrantless inspections," as an expectation of privacy "necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions." Nohara, 3 P.3d at 1242 (emphasis in

original, quoting United States v. Eisler, 567 F.2d 814,816 (8th Cir. 1977).

With respect to the individual apartment units, LPI similarly has no expectation of privacy. Tenants have a privacy expectation that is sufficient to exclude landlords from entering without invitation. See, e.g., Chapman v. United States, 365 U.S. 610,616-17 (1961). Thus, LPI suffered no constitutional deprivation when tenants allowed the task force inspectors to enter the apartment units. Therefore, the district court properly entered summary judgment on this claim.

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

APPENDIX C -- ORDER DENYING REHEARING FILED APRIL 3, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-55018
D.C. NO. CV-93-01144-JSL

LPI DOWNTOWN INVESTORS 1, a California limited partnership; MICHAEL H. LAPIDUS,

Plaintiffs-Appellants,

JAMES K. HAHN, individually and as City Attorney for the City of Los Angeles; RICHARD M. BOBB, individually and as Deputy City Attorney for the City of Los Angeles; HOWARD D. STERN, individually and as Electrical Inspector for the City of Los Angeles; DAVID FONSECA, individually and as Building Inspector for the City of Los Angeles; ROLAND WIJANGCO, individually and as Building Inspector for the City of Los Angeles; HERBERT H. ZIMMERMAN, individually and as Plumbing Inspector for the City of Los Angeles; CARL J. MANZEL, individually and as Electrical Inspector for the City of Los Angeles; STAN UYEHARA, individually and as Health Inspector for the County of Los Angeles; KENNETH L. MARKS, individually and as Health Inspector for the County of Los Angeles; CITY OF LOS ANGELES,

Defendants-Appellees.

Order Denying Rehearing

Before: WALLACE, TROTT and HAWKINS, Circuit Judges.

The panel as constituted above has voted to

deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.